

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA**

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| STATE OF OKLAHOMA, |) | |
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| Plaintiff, |) | |
| |) | |
| v. |) | Case No. 4:05-cv-00329-GKF-PJC |
| |) | |
| TYSON FOODS, INC., <i>et al.</i> , |) | |
| |) | |
| Defendants. |) | |

**STATE OF OKLAHOMA’S MOTION FOR RECONSIDERATION
OF THE COURT’S SEPTEMBER 4, 2009 MINUTE ORDER [DKT #2596]**

COMES NOW the Plaintiff, the State of Oklahoma (“the State”), and moves this Court for reconsideration of its September 4, 2009 Minute Order [DKT #2596] granting in part "Defendants' Joint Motion in Limine to Preclude Plaintiffs [sic] from Attributing to Poultry Defendants Any Evidence Related to the Use of Poultry Litter by Cattle, Farmers and Other Independent Third Parties," DKT #2407, on the ground that the Court erred.

I. Introduction

Defendants moved to preclude the State from attributing to Defendants any evidence related to the land application of poultry waste by third persons (*i.e.*, by persons other than Defendants, persons applying poultry waste on Defendants' land, contract growers, and / or persons applying poultry waste on contract growers' land). *See* DKT #2407. The Court granted the motion in part and denied the motion in part. The Court denied the motion with respect to the State's RCRA claim. *See* Sept. 4, 2009 Transcript, pp. 239-40. The Court reserved ruling with respect to the State's claim under 27A Okla. Stat. § 2-6-105. *See* Sept. 4, 2009 Transcript, pp. 243-44. And the Court granted the motion as to Restatement (Second) of Torts, § 427B liability for poultry waste transferred by poultry growers to third persons for land application on

non-grower property under the State's common law nuisance and trespass claims. *See* Sept. 4, 2009 Transcript, p. 240. In granting that portion of the motion, the Court explained: "I think the language of 427B is restricted or restricts the concept of foreseeability to a situation where one employs an independent contractor and doesn't go beyond that" *See* Sept. 4, 2009 Transcript, p. 240. It is this third and last part of the Court's order that the State seeks reconsideration of. The State respectfully suggests that the Court erred in its interpretation of the language of Restatement (Second) of Torts, § 427B by improperly limiting, as a matter of law, the outer reach of Defendants' liability to land application by poultry growers (or others) on poultry growers' land -- despite the fact that the removal and disposal of poultry waste generated by Defendants' birds is part of the "work" of the poultry grower, that Defendants know or have reason to know that that work includes transfers of poultry waste to third persons for land application on non-grower property, and that Defendants know or have reason to know that land application of that poultry waste is likely to involve a trespass or the creation of a nuisance. Rather than ruling as a matter of law that land application of poultry waste generated by Defendants' birds and transferred to third persons for land application on non-grower property falls outside the reach of Restatement (Second) of Torts, § 427B, the State respectfully submits that the Court should have awaited the development of a factual record to determine whether such transfers were, as the State alleges, part of and a foreseeable consequence of the work of poultry growing such that Restatement (Second) of Torts, § 427B could and would apply.

II. Legal Standard

"[A]ll rulings in limine are, by their very nature, preliminary, and the court may change its ruling at any time for whatever reason it deems appropriate." *See Bynum v. Cavalry Portfolio Services., L.L.C.*, 2006 U.S. Dist. LEXIS 21290, *14-15 (N.D. Okla. Apr. 13, 2006) (citing *Jones*

v. Stotts, 59 F.3d 143, 146 (10th Cir. 1995)). Accordingly, the more traditional and stricter standard of reconsideration -- whose grounds include "(1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice," *see Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) -- does not apply to the State's Motion. Even if that more traditional and stricter standard were to apply, however, the State can show that the Court misapprehended the controlling law and facts in reaching that portion of its ruling granting the motion.

III. Argument

The State's case has, from the outset, been about Defendants not properly managing the massive amounts of poultry waste generated by the millions of birds that they place in the IRW annually. Paragraph 46 of the Second Amended Complaint alleges:

. . . [T]he Poultry Integrator Defendants are responsible for the safe handling and disposal of the poultry waste generated in the course of the poultry growing operations associated with their respective birds.

Paragraph 54 alleges:

. . . [E]ach of the Poultry Integrator Defendants has long known that poultry waste is an enormous contributor to phosphorus and other pollution in the IRW. Nevertheless, each of the Poultry Integrator Defendants continues to allow large amounts of its respective poultry waste to be improperly stored and applied on lands within the IRW each year (hereinafter "poultry waste disposal practices").

And paragraph 56 alleges:

. . . [E]ach of the Poultry Integrator Defendants has long known that such poultry waste disposal practices present the threat that constituents of poultry waste will run off and be released into and from the land to which the poultry waste is applied thereby potentially adversely impacting the IRW, including the biota, lands, waters and sediments therein, and that such practices have in fact resulted in constituents of poultry waste running off and being released into and from the land to which the poultry waste is applied thereby adversely impacting the IRW, including the biota, lands, waters and sediments therein.

Defendants' birds in the IRW are typically raised by so-called contract poultry growers. "Poultry waste 'necessarily follows' from the 'growing' of poultry." *City of Tulsa v. Tyson Foods, Inc.*, 258 F. Supp. 2d 1263, 1297 (N.D. Okla. 2003), *vacated in connection with settlement*. A necessary and entirely foreseeable part of the work of raising flock after flock of Defendants' birds is periodically removing the accumulated poultry waste and disposing of it. Defendants direct clean-outs of the poultry houses. Poultry growers carry out the work of removing and disposing of this poultry waste by land-applying poultry waste to their own property or transferring the poultry waste to others for land application. The overwhelming majority of the poultry waste generated by Defendants' birds is and has been disposed of on lands in the IRW. This disposal occurs in close proximity to the poultry houses because it is not economically feasible to transport it longer distances. Defendants know that this poultry waste will be disposed of in this manner, and that such disposal will result in runoff and leaching of phosphorus and bacteria into the waters of the State, thereby causing pollution.

One way (among others) the State contends Defendants are liable for this waste is by operation of Restatement (Second) of Torts, § 427B. Restatement (Second) of Torts, § 427B provides that:

One who employs an independent contractor to do work which the employer knows or has reason to know to be likely to involve a trespass upon the land of another or the creation of a public or a private nuisance, is subject to liability for harm resulting to others from such trespass or nuisance.

(Emphasis added.) As explained in comment b to Restatement (Second) of Torts, § 427B, "[i]t is not . . . necessary to the application of the rule that the trespass or nuisance be directed or authorized, or that it shall necessarily follow from the work. It is sufficient that the employer has reason to recognize that, in the ordinary course of doing the work in the usual or prescribed manner, the trespass or nuisance is likely to result."

The State agrees with the Court that "[w]ords have meaning" and that "427B is constrained by its language." *See* Sept. 3, 2009 Transcript, p. 244. A reasonable conclusion from the facts laid out above is that the transfer of poultry waste to third persons for land application on non-grower property falls squarely within the ambit of "work" "one employs an independent contractor to do." *See* Restatement (Second) of Torts, § 427B. Defendants have had reason to recognize, in the ordinary course of raising poultry in the usual manner, that poultry waste will be generated, that it will need to be disposed of, and in fact is disposed of, through land application by poultry growers and third persons, and that a trespass or nuisance would be the likely result. *See* Restatement (Second) of Torts, § 427B, cmt. b.

"Foreseeableness becomes a question of law for the court only when one reasonable conclusion can be drawn from the facts." *Atherton v. Devine*, 602 P.2d 634, 637 (Okla. 1979) (citations omitted). Here, a reasonable conclusion that can be drawn from the facts here is that the transfer of poultry waste to third persons for application on other persons' land in the IRW foreseeably falls within the ambit of "work" "one employs an independent contractor to do." *See* Restatement (Second) of Torts, § 427B. To wit: Poultry waste necessarily follows from growing poultry. This poultry waste must be periodically removed from the poultry houses and disposed of. Defendants make no provision for the safe handling of this poultry waste generated by their birds. Many poultry growers' land is so saturated with phosphorus from previous land disposals of poultry waste that such land can receive no more. Defendants know or should know land application is the only method of disposing of the poultry waste generated by their birds, and that it is economically infeasible for growers or others to move that waste far without economic subsidy. Thus, a foreseeable means of disposing of this poultry waste -- part of the "work" of

raising poultry -- is to transfer it to third persons for land application on other persons' land in the IRW.

It is beside the point, the State submits, whether it is the poultry grower or some third person who ultimately places the poultry waste on the land in the IRW. Defendants have created a foreseeable risk associated with the work they have contracted out to the poultry growers. By failing to make arrangements for the proper and safe handling of the poultry waste generated by their birds, Defendants are vicariously liable under Restatement (Second) of Torts, § 427B, for any nuisance or trespass caused by this waste.

Accordingly, on reconsideration, this Court should deny Defendants' motion as to Restatement (Second) of Torts, § 427B liability for poultry waste transferred by poultry growers to third persons for land application on non-grower property under the State's common law nuisance and trespass claims, and instead await development of a factual record to determine whether such third-person transfers fall within the reach of Restatement (Second) of Torts, § 427B.

IV. Conclusion

In light of the foregoing, the State's Motion should be granted.

Respectfully Submitted,

W.A. Drew Edmondson OBA #2628
ATTORNEY GENERAL
Kelly H. Foster OBA #17067
ASSISTANT ATTORNEY GENERAL
State of Oklahoma
313 N.E. 21st St.
Oklahoma City, OK 73105
(405) 521-3921

M. David Riggs OBA #7583
Joseph P. Lennart OBA #5371
Richard T. Garren OBA #3253
Sharon K. Weaver OBA #19010
Robert A. Nance OBA #6581
D. Sharon Gentry OBA #15641
David P. Page OBA #6852
RIGGS, ABNEY, NEAL, TURPEN,
ORBISON & LEWIS
502 West Sixth Street
Tulsa, OK 74119
(918) 587-3161

Louis W. Bullock OBA #1305
Robert M. Blakemore OBA 18656
BULLOCK, BULLOCK & BLAKEMORE
110 West Seventh Street Suite 707
Tulsa OK 74119
(918) 584-2001

Frederick C. Baker
(admitted *pro hac vice*)
Elizabeth Claire Xidis
(admitted *pro hac vice*)
MOTLEY RICE LLC
28 Bridgeside Boulevard
Mount Pleasant, SC 29465
(843) 216-9280

/s/ Ingrid L. Moll

William H. Narwold
(admitted *pro hac vice*)
Ingrid L. Moll
(admitted *pro hac vice*)
Mathew P. Jasinski
(admitted *pro hac vice*)

MOTLEY RICE LLC
20 Church Street, 17th Floor
Hartford, CT 06103
(860) 882-1678

Jonathan D. Orent
(admitted *pro hac vice*)
Michael G. Rousseau
(admitted *pro hac vice*)
Fidelma L. Fitzpatrick
(admitted *pro hac vice*)
MOTLEY RICE LLC
321 South Main Street
Providence, RI 02940
(401) 457-7700

Attorneys for the State of Oklahoma

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 2009, I electronically transmitted the above and foregoing pleading to the Clerk of the Court using the ECF System for filing and a transmittal of a Notice of Electronic Filing to the following ECF registrants:

| | |
|--|----------------------------------|
| W. A. Drew Edmondson, Attorney General | fc_docket@oag.ok.gov |
| Kelly H. Foster, Assistant Attorney General | kelly_foster@oag.ok.gov |
| | |
| M. David Riggs | driggs@riggsabney.com |
| Joseph P. Lennart | jlennart@riggsabney.com |
| Richard T. Garren | rgarren@riggsabney.com |
| Sharon K. Weaver | sweaver@riggsabney.com |
| Robert A. Nance | rnance@riggsabney.com |
| D. Sharon Gentry | sgentry@riggsabney.com |
| David P. Page | dpage@riggsabney.com |
| RIGGS, ABNEY, NEAL, TURPEN, ORBISON & LEWIS | |
| | |
| Louis Werner Bullock | lbullock@bullock-blakemore.com |
| Robert M. Blakemore | bblakemore@bullock-blakemore.com |
| BULLOCK, BULLOCK & BLAKEMORE | |
| | |
| Frederick C. Baker | fbaker@motleyrice.com |
| Elizabeth Claire Xidis | cxidis@motleyrice.com |
| William H. Narwold | bnarwold@motleyrice.com |
| Ingrid L. Moll | imoll@motleyrice.com |
| Jonathan D. Orent | jorent@motleyrice.com |
| Michael G. Rousseau | mrousseau@motleyrice.com |
| Fidelma L. Fitzpatrick | ffitzpatrick@motleyrice.com |
| MOTLEY RICE LLC | |
| <u>Counsel for State of Oklahoma</u> | |
| | |
| | |
| Robert P. Redemann | rredemann@pmrlaw.net |
| PERRINE, MCGIVERN, REDEMANN, REID, BARRY & TAYLOR, P.L.L.C. | |
| | |
| David C. Senger | david@cgmlawok.com |
| | |
| Robert E Sanders | rsanders@youngwilliams.com |
| Edwin Stephen Williams | steve.williams@youngwilliams.com |
| YOUNG WILLIAMS P.A. | |
| <u>Counsel for Cal-Maine Farms, Inc and Cal-Maine Foods, Inc.</u> | |
| | |
| | |
| John H. Tucker | jtucker@rhodesokla.com |

| | |
|--|-----------------------------|
| Theresa Noble Hill | thill@rhodesokla.com |
| Colin Hampton Tucker | ctucker@rhodesokla.com |
| Kerry R. Lewis | klewis@rhodesokla.com |
| RHODES, HIERONYMUS, JONES, TUCKER & GABLE | |
| | |
| Terry Wayen West | terry@thewestlawfirm.com |
| THE WEST LAW FIRM | |
| | |
| Delmar R. Ehrich | dehrich@faegre.com |
| Bruce Jones | bjones@faegre.com |
| Krisann C. Kleibacker Lee | kklee@faegre.com |
| Todd P. Walker | twalker@faegre.com |
| Christopher H. Dolan | cdolan@faegre.com |
| Melissa C. Collins | mcollins@faegre.com |
| Colin C. Deihl | cdeihl@faegre.com |
| Randall E. Kahnke | rkahnke@faegre.com |
| FAEGRE & BENSON, LLP | |
| | |
| <u>Counsel for Cargill, Inc. & Cargill Turkey Production, LLC</u> | |
| | |
| | |
| James Martin Graves | jgraves@bassettlawfirm.com |
| Gary V Weeks | gweeks@bassettlawfirm.com |
| Woody Bassett | wbassett@bassettlawfirm.com |
| K. C. Dupps Tucker | kctucker@bassettlawfirm.com |
| Earl Lee "Buddy" Chadick | bchadick@bassettlawfirm.com |
| Vincent O. Chadick | vchadick@bassettlawfirm.com |
| BASSETT LAW FIRM | |
| | |
| George W. Owens | gwo@owenslawfirmmpc.com |
| Randall E. Rose | rer@owenslawfirmmpc.com |
| OWENS LAW FIRM, P.C. | |
| <u>Counsel for George's Inc. & George's Farms, Inc.</u> | |
| | |
| | |
| A. Scott McDaniel | smcdaniel@mhla-law.com |
| Nicole Longwell | nlongwell@mhla-law.com |
| Philip Hixon | phixon@mhla-law.com |
| Craig A. Merkes | cmerkes@mhla-law.com |
| MCDANIEL, HIXON, LONGWELL & ACORD, PLLC | |
| | |
| Sherry P. Bartley | sbartley@mws gw.com |
| MITCHELL, WILLIAMS, SELIG, GATES & WOODYARD, PLLC | |
| <u>Counsel for Peterson Farms, Inc.</u> | |
| | |

| | |
|--|-----------------------------|
| | |
| John Elrod | jelrod@cwlaw.com |
| Vicki Bronson | vbronson@cwlaw.com |
| P. Joshua Wisley | jwisley@cwlaw.com |
| Bruce W. Freeman | bfreeman@cwlaw.com |
| D. Richard Funk | rfunk@cwlaw.com |
| CONNER & WINTERS, LLP | |
| <u>Counsel for Simmons Foods, Inc.</u> | |
| | |
| | |
| Stephen L. Jantzen | sjantzen@ryanwhaley.com |
| Paula M. Buchwald | pbuchwald@ryanwhaley.com |
| Patrick M. Ryan | pryan@ryanwhaley.com |
| RYAN, WHALEY, COLDIRON & SHANDY, P.C. | |
| | |
| Mark D. Hopson | mhopson@sidley.com |
| Jay Thomas Jorgensen | jjorgensen@sidley.com |
| Timothy K. Webster | twebster@sidley.com |
| Thomas C. Green | tcgreen@sidley.com |
| Gordon D. Todd | gtodd@sidley.com |
| SIDLEY, AUSTIN, BROWN & WOOD LLP | |
| | |
| Robert W. George | robert.george@tyson.com |
| L. Bryan Burns | bryan.burns@tyson.com |
| Timothy T. Jones | tim.jones@tyson.com |
| TYSON FOODS, INC | |
| | |
| Michael R. Bond | michael.bond@kutakrock.com |
| Erin W. Thompson | erin.thompson@kutakrock.com |
| Dustin R. Darst | dustin.darst@kutakrock.com |
| KUTAK ROCK, LLP | |
| <u>Counsel for Tyson Foods, Inc., Tyson Poultry, Inc., Tyson Chicken, Inc., & Cobb-Vantress, Inc.</u> | |
| | |
| | |
| R. Thomas Lay | rtl@kiralaw.com |
| KERR, IRVINE, RHODES & ABLES | |
| Frank M. Evans, III | fevans@lathropgage.com |
| Jennifer Stockton Griffin | jgriffin@lathropgage.com |
| David Gregory Brown | |
| LATHROP & GAGE LC | |
| <u>Counsel for Willow Brook Foods, Inc.</u> | |
| | |
| | |
| Robin S Conrad | rconrad@uschamber.com |
| NATIONAL CHAMBER LITIGATION CENTER | |

| | |
|---|---------------------------------|
| | |
| Gary S Chilton | gchilton@hcdattorneys.com |
| HOLLADAY, CHILTON AND DEGIUSTI, PLLC | |
| <u>Counsel for US Chamber of Commerce and American Tort Reform Association</u> | |
| | |
| | |
| D. Kenyon Williams, Jr. | kwilliams@hallestill.com |
| Michael D. Graves | mgraves@hallestill.com |
| HALL, ESTILL, HARDWICK, GABLE, GOLDEN & NELSON | |
| <u>Counsel for Poultry Growers/Interested Parties/ Poultry Partners, Inc.</u> | |
| | |
| | |
| Richard Ford | richard.ford@crowedunlevy.com |
| LeAnne Burnett | leanne.burnett@crowedunlevy.com |
| CROWE & DUNLEVY | |
| <u>Counsel for Oklahoma Farm Bureau, Inc.</u> | |
| | |
| | |
| Kendra Akin Jones, Assistant Attorney General | Kendra.Jones@arkansasag.gov |
| Charles L. Moulton, Sr Assistant Attorney General | Charles.Moulton@arkansasag.gov |
| <u>Counsel for State of Arkansas and Arkansas National Resources Commission</u> | |
| | |
| | |
| Mark Richard Mullins | richard.mullins@mcafeetaft.com |
| MCAFEE & TAFT | |
| <u>Counsel for Texas Farm Bureau; Texas Cattle Feeders Association; Texas Pork Producers Association and Texas Association of Dairymen</u> | |
| | |
| | |
| Mia Vahlberg | mvahlberg@gablelaw.com |
| GABLE GOTWALS | |
| | |
| James T. Banks | jtbanks@hhlaw.com |
| Adam J. Siegel | ajsiegel@hhlaw.com |
| HOGAN & HARTSON, LLP | |
| <u>Counsel for National Chicken Council; U.S. Poultry and Egg Association & National Turkey Federation</u> | |
| | |
| | |
| John D. Russell | jrussell@fellerssnider.com |
| FELLERS, SNIDER, BLANKENSHIP, BAILEY & TIPPENS, PC | |
| | |
| William A. Waddell, Jr. | waddell@fec.net |
| David E. Choate | dchoate@fec.net |

| | |
|--|----------------------------|
| FRIDAY, ELDREDGE & CLARK, LLP | |
| <u>Counsel for Arkansas Farm Bureau Federation</u> | |
| | |
| | |
| Barry Greg Reynolds | reynolds@titushillis.com |
| Jessica E. Rainey | jrainey@titushillis.com |
| TITUS, HILLIS, REYNOLDS, LOVE, DICKMAN & MCCALMON | |
| | |
| Nikaa Baugh Jordan | njordan@lightfootlaw.com |
| William S. Cox, III | wcox@lightfootlaw.com |
| LIGHTFOOT, FRANKLIN & WHITE, LLC | |
| <u>Counsel for American Farm Bureau and National Cattlemen's Beef Association</u> | |
| | |
| | |
| Duane L. Berlin | dberlin@levberlin.com |
| LEV & BERLIN PC | |
| <u>Counsel for Council of American Survey Research Organizations & American Association for Public Opinion Research</u> | |
| | |
| | |
| Diane Hammons | Diane-Hammons@cherokee.org |
| Sara Hill | Sarah-Hill@cherokee.org |
| <u>Counsel for the Cherokee Nation</u> | |

/s/ Ingrid L. Moll

Ingrid L. Moll